

Rule of law and reforming the judicial system in Nepal

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Boston University



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Dear Mr. Helgason,

We have just received your FAX requesting our comments on your TOR relating to the Rule of Law and Reforming the Judicial System in Nepal. Coincidentally, we are now here in Bhutan on a somewhat similar UNDP Mission. (At the moment, we are presently writing up our report on a week-long workshop of about 42 judges and ministry officials, held under the auspices of the High Court, supplemented this week by more in-depth interviews with leading judicial and ministerial officials.)

Relating to the TOR, we make two initial comments and a suggestion. The two initial comments relate to the TOR's substance. The suggestion is that, since we are next door in Bhutan, if you thought it desirable, we might easily stop in Kathmandu for a week on our way home to consult on the project, and perhaps even undertake your Step I.

Our two substantive comments concern the relative weight the TOR gives to reform of the judicial system compared to other, complimentary institutional reforms in aid of good governance. The TOR sharply defines the difficulties Nepal has encountered in ensuring good governance, and the accompanying difficulties in facilitating development. Our own experiences elsewhere reinforce the central theme of the TOR: Especially as a government moves towards an increasingly market-oriented economy, unless it ensures non-arbitrary decision-making -- that is, openness, accountability, participation, decision by rule -- in short, the Rule of Law -- effective development programs become difficult and then impossible, and corruption comes immediately behind.

Given bad governance and its attendant incoherence and prevalent corruption, the TOR suggests a broad-ranging program that we read as having two principal foci: To strengthen the judicial system generally, and the criminal justice system in particular as a way to stem corruption. Without questioning the urgent need to accomplish those two tasks, we suggest that other aspects of the legal order may also need strengthening, particularly, the law-creating process. The TOR includes building that process's

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capacity; our comments refer only to the relative emphasis the TOR accords that capacity-building. Here we discuss, first, the relative importance of courts in good governance generally and particularly in developing a market economy -- that is, the civil side of the court system; and, second, the criminal side with special emphasis on the control of corruption.

I. THE FUNCTION OF THE COURT SYSTEM IN ENSURING GOOD GOVERNANCE

In our view, the legal order -- by which we mean the entire normative system operated by the State, including the *rules* of law (constitutions, statutes, judicial precedents, ministerial regulations, local by-laws, subsidiary legislation, etc.), the institutions of *law-making* (Parliament, Cabinet, ministers who promulgate subsidiary legislation and regulations, appellate courts which lay down precedents in a common law system, municipal councils, etc.), *implementing* agencies (courts, ministries, departments, Cabinet, the police, district and local governments, etc.) and finally ordinary citizens in their roles as addressees of particular laws (when I drive an automobile, I become part of the governmental legal order as the addressee of the motor vehicle laws).

The legal order performs many function, of which two predominate: Dispute settlement, and behavior-channeling. Courts play a major role in dispute settlement, less so, in behavior-channelling. As dispute-settlement agencies, as the TOR states, courts help to settle businessmen's disputes over contract, property, the internal affairs of corporations, intellectual property, and many others. In every country, most businessmen's laws -- that is, property and commercial law generally -- rely on individual law-suits for their implementation. For that kind of implementation, courts become indispensable. Unless they function, property law, contract law, sales law, corporation law, all the laws that form part of the framework within which market activities take place, remain unimplemented; businessmen substitute crony relationships for market relationships; and, as the current Asian crisis demonstrates, all too easily ultimately ends in confusion.

Markets, however, require a legal framework beyond businessmen's law. Our first comment on the TOR suggests that it might pay more attention to the legal framework for the institutions that, as it were, form a necessary infrastructure for markets. Unless farmers produce goods for sale, no market in agricultural products can exist -- no matter how well written the laws of contract and property, no matter how well the courts enforce them. For farmers to produce requires many government functions in aid of production: Building feeder roads, so they can get goods to market; providing agricultural extension services, to improve their technology; working with banks to ensure a flow of credit to small farmers; providing legal frameworks for marketing cooperatives; and many others. In every

sector, a vigorous market economy of course today requires more or less analogous laws to these.

Government initiates, guides, changes and if necessary abolishes these 'infrastructural' market institutions through laws, almost invariably, legislation and subsidiary legislation. These infrastructural laws almost never become the subject of litigation; they rarely if ever get into court. Because courts are institutionally reactive, not proactive, courts almost never interpret or enforce them. To implement laws underpinning government programs for feeder roads, agricultural extension, agricultural small loans, and marketing cooperatives, not to speak of analogous programs in support of small and microenterprises in the informal sector, environmental protection, transport and communication, banking, the law of money supply, education, health, town planning, public utilities and perhaps nine yards of others, government relies not on courts, but ministries, departments, local government, and many others. These agencies implement these laws not by deciding disputes between individuals or between government and individuals, as do the courts, but proactively, in many ways.

Thus government, by laws directed not only to individuals but to various agencies, seeks, not only to provide laws for settling disputes (as it does with businessmen's laws), but also to change behaviours among both citizens and officials. That is to say, for these essential market infrastructural laws, government enacts laws primarily to change and hopefully to improve *institutions*.

For the legal order's behaviour-channeling and therefore institution-building function, the legislative and administrative functions become all-important. We assume that other programs in Nepal look to strengthening the administrative function. We note that the TOR mentions as matters of concern legislative drafting and aspects of the law-enacting process. Our experience suggests that the success or failure of a law whose primary purpose is institution-building depends in the first instance upon the bill-creating process -- that is, the process by which somebody's bright idea becomes a bill approved by Cabinet. We would urge expanding the sections of the TOR focus on building capacity in that bill-creating process as an activity of equal dignity with strengthening the courts. The same results obtain in considering the TOR's emphasis on controlling corruption.

II. CONTROLLING CORRUPTION

Of course, strengthening the courts comprises an essential aspect of ensuring the Rule of Law; but, in our experience, it remains, while necessary, an insufficient requirement. Judges can only make decisions when someone brings cases. Those involved in the business of corruption rarely have an incentive to bring a case to the court. As with prostitution, neither the buyer nor seller of favors sees any benefit of

going to court, far less opening the business to public scrutiny. Furthermore, even when corruption cases come to courts, the judges' can only impose punishment. The assumption that courts comprise the chief way to combat corruption has led to increasingly severe sentences -- up to and including capital punishment -- not infrequently with little apparent reduction in corrupt practices. Extensive research shows that the severity of punishment seldom deters criminal behavior, least of all corruption. Not without reason, given the unlikely possibility of anybody reporting the corruption, corrupt officials and those who corrupt them always assume that they will get away with it.

That teaches that while of course efforts must be made to improve and strengthen the criminal law and the criminal justice system, these will likely make only a marginal impact on corruption. The first wisdom in attacking corruption suggests that of course corruption comes about because of weak *people*; it also comes about because of weak *institutions*. Using primarily the criminal justice system to attack corruption assumes that weak people lie at its heart. Surely at least as important in stopping speculation of government funds as the criminal justice system is the system of audit and control; good accountants likely can stop more corruption than good criminal judges and good criminal law. Statutes that limit discretion and require decision-makers to justify their decisions in writing provide a better basis for limiting bribery and favoritism than prosecuting the rare official actually caught with the hot hand stretched out. Sound government procurement statutes prevent corruption before it occurs. In short, sound institutions can make the incidence of corruption less likely; punishment only identifies corruption after it has occurred.

Our experience -- backed by many studies of corruption in developing and transitional countries -- suggests the necessity of drafting new laws defensively to eliminate or at least reduce government officials' opportunities to engage in corrupt practice. That again puts a much greater emphasis than suggested by your TOR on strengthening the law-making system to draft and enact effectively implementable laws that explicitly limit official discretion by specifying the criteria and procedures by which implementing personnel may decide how to behave; and ensuring adequate monitoring and evaluating mechanisms to expose corrupt practices (including the participation of stakeholders likely to experience their negative effects). Various governments have introduced a range of proactive institutions to identify corrupt officials, including an ombud; telephone 'headlines'; incentives for 'whistle-blowers' (like half the fine collected from an official whose corrupt practice they expose); etc.

This would underscore those parts of your TOR that suggest the need for legislative drafting training, as well as methods of opening up the law-making process. In our experience, that would require that the proposed Mission undertake to scrutinize the existing law-making process, from the time someone gets an idea for a policy that

seems to require legislation; through the process in which drafters must translate the broad policy statement into the detailed legislative measures supposedly designed to ensure its effective implementation; through Cabinet and the legislature whose members must decide whether, in their country's unique circumstances, the bill's details will likely achieve its stated objectives.

Too often, in the countries where we have worked (including here), that process remains insufficiently specified. Seldom does government have any system for prioritizing proposed bills on which to spend scarce drafting legislation. Without any specified criteria or procedures to guide them, drafters typically neither use reason informed by experience to design bills' details in ways required to ensure their implementation; nor provide any kind of justification, based on logic and facts, which would enable Cabinet members and legislators to assess their likely outcomes in the country's specific circumstances.

The outcome of scrutinizing the existing law-making system, and especially the legislative drafting process, would undoubtedly lead to more specific proposals for training the relevant actors: ministry officials who must prepare policies for legislation; drafters who must translate those policies in bills' detailed measures, and justify those details by reason informed by experience; Cabinet members who must decide what criteria and procedures to use in prioritizing legislation; and legislators who must ultimately decide whether or not to enact the proposed bills, and whose responsibilities to their constituents probably should include some form of monitoring and evaluation of their implementation and social impact. Presumably, if you added this dimension to the TOR, the proposed Mission would need to explore all these options, and more.

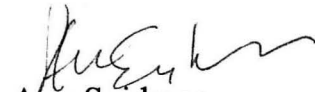
Of course courts constitute an extremely important aspect of an adequate legal order committed to preserving and enhancing good governance. This letter wholly supports the TOR as written; it suggests only that the TOR bring forward the requirement that the project also examine carefully and strengthen as necessary the bill-creating and law-enacting functions of government.

As to the suggestion that we might go to Kathmandu for a week before we return to Boston: We remain unsure whether you did, in fact, intend us to consider undertaking the Mission. We know the UNDP in Pakistan has our CVs, but we do not know whether you have received them.

However, if you do want us to come, we could arrive there by air -- assuming we can get on the flight from Paro -- Monday, March 8, and work through Saturday, March 15. We would probably have to finalize any report we wrote after our return home, and mail it to you by DHL. The advantages in time and money saved seem evident, but obviously constraints in terms of availability of the key personnel

whom we would have to interview may make this suggestion impractical. If you would like us to come, please let us know ASAP so we can try to arrange the necessary flight arrangements.

Sincerely yours,



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